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No. 428

IN THE

Supreme Court of the United States

October Term 1949

THE UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, WASHINGTON REAL ESTATE BOARD, et al., *Appellees*

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF WASHINGTON REAL ESTATE BOARD AND INDIVIDUAL APPELLEES OTHER THAN HERBERT U. NELSON AND J. HAWLEY SMITH

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OPINIONS BELOW

The opinion below of Judge Holtzoff (R. 437) is reported in 84 F. Supp. 802. The opinion of Judge Curran in the criminal case, identical in material allegations with the Complaint herein, is reported in 80 F. Supp. 350 and may be found in the record herein at p. 306.

OUTLINE OF ARGUMENT

I.

The Government has made no showing the Findings of Fact made below are clearly erroneous.

From 1917 until 1943 commission rates on the sale, lease, etc. of real estate in the District of Columbia were based on a Boundary Zone, inside which rates were lower, outside which rates were higher. These rates were established by custom, practice and usage.

The testimony was they were "accepted by everybody, by the brokers, by the banks and by the courts themselves." The Government did not claim (See Compl. par. 19, R. 368) or prove the defendants had anything to do with fixing them.

The Boundary Zone went through Georgetown, Cleveland Park, Brookland and other sections which in the '20's and '30's became a vast residential and apartment house area as urban as downtown Washington. As time went on the Boundary Zone became more and more unrealistic and inequitable, causing complaints from owners and brokers alike.

In 1939 the Washington Board appointed a committee to study the problem but nothing was done until February 1943 when the members at a Special Meeting voted to abolish the Boundary Zone as a yard-stick and adopted a straight scale of commissions applicable everywhere in the District.

The Washington Board contends it had a right to remedy this situation and abolish the Boundary Zone so far as its members were concerned. As the Boundary Zone established a scale of rates the Washington Board was

compelled, upon its abolition, either to substitute a new scale or have no scale at all.

The Court below found the new schedule resulted in higher commissions in many instances and lower commissions in others. (Fng. 10, R. 434) The Court also made important Findings of Fact that the schedules of standard commissions were construed by the members as non-mandatory in character and as setting forth a basis upon which to estimate fair compensation for services performed. (Fng. 16, R. 434). The published rates were used in a great majority of instances, altho in many cases members departed from them and in exceptional cases a lower charge was made. (Fng. 11-12, R. 434)

The Court below also found that there is no proof the standard rate of commissions was unreasonable or unreasonably restrained competition between brokers or adversely affected the sale of real estate. (Fng. 13, R. 434)

The Government has made no serious showing that these findings are clearly erroneous but has cast its whole case upon the doctrine that rate-fixing like price fixing is always, *per se*, illegal. But, clearly, if these findings are not clearly erroneous there is no rate-fixing at all but only, as the Court below held, the publication of schedules of commissions, non-mandatory in character, setting forth a basis upon which to estimate fair compensation for services performed.

II.

The Court below found that the Schedule of Standard rates, embodied in the standard contract presented to the principal, consists of an offer by the broker to perform personal services at the rate specified. (Fng. 17, R. 434) It is difficult to perceive rate-fixing when this offer, at most, is made by 250 realtors out of a total of 3525 real

estate agents licensed in the District. In any event rate-fixing for personal services is obviously only wage-fixing, here fixing an offering price. Section 6 of the Clayton Act, in stating that "The labor of a human being is not a commodity or article of commerce" announces a broad public policy which up to now has been respected by the Government which has never prosecuted workers who either singly, or united with others without contact with outside groups, have attempted to improve their lot. The right of a worker, even a white-collar worker, to offer to work for whatever he sees fit, and even to unite with his fellows in making such offers, is a natural right, and in no way a boon conferred by the State. The holding of the Court below that Sec. 6 of the Clayton Act excludes personal services and wage-fixing (here *offers* to work at given rates), and that the Sherman Act has never been construed to apply to such activities, is essentially sound and indeed necessary to prevent us committing ourselves, unwittingly, to one of the concepts of the totalitarian state.

III.

The judgment of acquittal in the criminal case, in which the indictment was word-for-word identical with the Complaint herein, operated as *res judicata* of the present Complaint. The acquittal resulted from defendants' motion for judgment made at the close of the Government's case, which in effect stated to the Court "assuming the facts charged are proved, still there was no violation of the Sherman Act." As the Government has but one complaint against defendants, which it casts, at its option, in criminal or civil form, and as the two actions are identical in their charges, no reason appears why when it elects to try the criminal case first, acquittal in that case should not bar the other. No question of proof beyond a reasonable doubt is involved.

IV.

THE SCHEDULE OF STANDARD COMMISSIONS ADOPTED FEBRUARY 16, 1943, DID NOT CONSTITUTE ILLEGAL PRICE-FIXING

A. Ambiguity of Complaint:

The Complaint charges that defendants engaged in a "conspiracy to restrain the trade and commerce of the District of Columbia in the sale, exchange, lease and management of real property."[1] (Compl. par. 11, R. 367) Rate-fixing is charged as the means by which this was to be accomplished. (See Compl. par. 12, R. 367) The first question is whether the conspiracy refers (1) to restraint of the sale, lease, etc., by a *principal* of his own real property or (2) to restraint of the business of running a real estate office, operating as a broker, etc. The distinction is important because if the former, (1) above, the Government must prove that an alleged agreement to fix brokers' rates would, or could, operate as a restraint upon an owner in selling, leasing, etc., his own real estate. The question was specifically put in issue by the Washington Board's Third, Fourth and Seventh defenses. (R. 390-1).

After two trials and two written opinions by two District Judges, defendants are still in the dark as to which theory is invoked.

To illustrate the confusion, Judge Curran in his opinion dismissing the criminal case starts out with the inquiry, "Is the business of the defendants interstate (sic)[2] commerce in the sense of that word as it has been used and understood in the decisions of the courts?" After de-

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[1] The Indictment makes the same charge, word for word. (Ind. par. 9, R. 314.)

[2] Judge Curran uses the phrase "interstate commerce", but evidently meant commerce in the District of Columbia, deemed "interstate" in a sense, under Sec. 3 of the Sherman Act.

veloping the point that the personal services of real estate brokers are mere aids of facilities to commerce, Judge Curran considers "their effect *in the sale of real estate*," and goes on to hold that such charges for services "do not immediately touch upon or act upon, nor do they directly affect the *sale of real estate* in the District of Columbia." (R. 307) The Court continues:

> "Of course, indirectly and as an incident they may enhance the cost of the *owner of real estate*, or they may add to the price paid by the purchaser, but they are not, in my opinion, charges which are directly laid upon *real estate* itself. Rather, are they charges for facilities given or provided to clients in the course of the *sale of real estate*.
>
> "Here in this case the conspiracy condemned by the statute is one whose direct and immediate effect is a restraint upon trade or commerce in the District of Columbia. As I say, charges for such facilities, in my opinion, are not restraints upon the trade or commerce, although, as I have indicated, the total cost of *selling the real estate* may be increased.
>
> "The right of the *owners of real estate* in the District of Columbia to sell their own property in any way whatever is not affected or touched by the agreement in question, while the privilege of *having their property sold for the real owner*, with the aid of a broker, is a privilege which they are charged for and which is not attached to their right to sell their own property." (R. 308). (Italics ours)

The above and the remainder of Judge Curran's opinion at R. 308 shows clearly that he was of the opinion that the charge was a conspiracy to restrain *owners* in the sale, lease, etc. of real estate.

It may well be questioned whether Judge Curran's opinion does not establish the law of the case which bound the court in the civil case, bearing in mind that the Complaint repeats word for word the charge of the Indictment. After all, the Government has but one grievance against defendants which took the form of a criminal in-

dictment and a civil complaint. The construction given the Indictment ought, on general principles, to govern the Complaint, the two being identical in their allegations.

The opinion of Judge Holtzoff in the civil case states at the outset that "The Government contends that the defendants have combined to fix real estate brokerage commissions" (R. 438) This is not necessarily inconsistent with the basic charge "of a conspiracy to restrain the trade and commerce of the District of Columbia in the sale, exchange, lease and management of real property," (Compl. par. 11, R. 367) bearing in mind that rate fixing is charged as the *means* (Compl. par. 12, R. 367). Later in his opinion Judge Holtzoff holds that there is no evidence showing the standard rate of commissions was unreasonable or excessive or "that this activity unduly or unreasonably restrains competition as between brokers or adversely affects the *sales of real property.*" (R. 438, Italics ours). This appears to adopt the latter or both theories.

Judge Holtzoff likewise found that there was no proof that the standard rate of commissions "unreasonably restrains competition between brokers or *adversely affects the sale of real estate.*" (Fng. 13, R. 434, Italics ours.) Also, the court below in its conclusions of law stated that publishing a standard rate of commissions does not alone, of itself, create an unreasonable restraint of trade in the absence of showing that such rates were unreasonable or oppressive in themselves or that they result in substantial diminution of competition or otherwise create an unreasonable restraint of trade or commerce. As Judge Holtzoff was aware of the frequent quotation from *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 to the effect that price fixing is always illegal *per se*, (See Judge Holtzoff's Op. R. 439), the indication is that he, too, felt the primary charge involved a restraint of owners, in which event rate fixing of brokers would involve merely a secondary re-

straint in respect of a *facility* as to which the rule of reason would apply.

The two opinions below show the difficulty of applying the Sherman Act to the facts of this case and the novelty of the litigation. As will be shown later in the present Brief, p. 15-24, the Anti-trust Acts have never, up to the present, been applied to personal services of the kind herein involved.

B. Confusion Caused by Boundary Zone:

When the Washington Board was organized in 1928, it found real estate commissions in the District were based on an artificial Boundary Line dividing downtown Washington from the outlying area. The Washington Board did not establish the Boundary Zone; it was established in 1917 by custom, practice and usage. (R. 285-287) and, as one witness put it, "was accepted by everybody, by the brokers, by the banks and by the courts themselves." (R. 287)

The commission on sales in the inner zone, downtown, was 5% on the first $5,000 and 3%, above. In the outer zone, beyond the Boundary Line, it was a straight 5%. (R. 110-113; 284-287) The larger commission for the outlying area went back to the horse and buggy days, when it took more time to take a prospect out to view the suburban property. (R. 286).[1]

As time passed, from 1917 on, the Boundary Zone be-

[1] The testimony refers to a Schedule of Standard Commissions around 1931, Gov. Ex. for identification 14, which was excluded on the Government's statement (R. 49) that it would not go back beyond 1940 and was withdrawn (R. 521). Ex. 13, R. 520, shows a 5% and 3% scale in 1934. It seems clear the Schedule of Standard Commissions adopted February 16, 1943 is what the Government now complains of. (See Compl. par. 19, R. 368, Gov. Brief p. 7-9; 29-31; 39-43) Only on this theory could the Government, under any conceivable circumstances, involve the National Association.

came more and more artificial and unrealistic. Sections of the city now as built-up as 14th and F Streets were outside the Boundary. As an instance, everything north of Cleveland Park and the large apartment house area around Wisconsin Avenue, north of Georgetown, was beyond the Boundary Line. Massachusetts Avenue at the Bridge over Rock Creek Park was in the suburban area; so, too, was all of Wesley Heights, Spring Valley, and the section surrounding the Westchester Apartments. The immense residential area known as Saul's Addition, commencing half a mile north of the Baseball Park and stretching to Silver Spring was suburban. The Section surrounding Catholic University was outside the Boundary Line and all of southeast Washington across the Bridge on Pennsylvania Avenue, S. E., or across the other bridge leading to the area around St. Elizabeth's Hospital. A map, Exhibit 13, at R. 520, shows the Boundary Zone.

With the advent of the cheap automobile the time element in taking prospects out to these areas disappeared. (R. 113, 286) The sale of an office building downtown, inside the zone, or an apartment house on Connecticut Avenue, outside the Zone, took about the same amount of time. (Ex. 20, R. 286, 553) Also, property owners just outside the line resented the lower rate for the sale of property just inside it. (Ex. 20, R. 255-256, 553) Most of the building, in the '30's, was beyond the Boundary Line. (R. 112) The worst feature of the Boundary Line was the confusion it caused (R. 112, 268-269, 284; Ex. 20, R. 552). The Boundary Line followed 38 different directions and, as one witness put it "was the biggest headache we had in the real estate business". (R. 268-269; Ex. 13, R. 520)

To meet the difficulties of the Boundary Zone a Special Commission Study Committee was appointed in the '30's (R. 46). The minutes of its meeting on February 10, 1939, shows that its primary purpose was to eliminate the two

commission zones (Ex. 12; R. 518-519).[1] Years passed without action. It is at this stage the Government, in its Brief, p. 17-22, claims the National Association entered the picture. We think the National Association has effectively disposed of this charge in its separate Brief herein. However, the plain facts are that on June 16, 1941, Mr. Charles J. Rush, Secretary of the Washington Board received a copy of a "guide on commission rates, rules and customs" from the National Board, (Ex. 17, R. 536). He put it in his desk and neither the Washington Board, nor any of its Committees ever considered it. (R. 127) As a matter of fact the Special Commission Study Committee did not meet during 1941 and 1942. (R. 59) It was not until almost two years later, on January 20, 1943, that the Directors of the Washington Board again took up the matter of the Boundary Zone. (R. 59, Ex. 18, R. 548) It is self evident that abolishing the Boundary Zone meant a change in rates, either in one place or the other. It is significant, however, that when the Directors took up the matter they considered rates entirely different from those contained in the National Associations' study. (Compare R. 548 with R. 544) The study contains countless recommendations never reflected in anything adopted by the Washington Board. (Compare Ex. 17a R. 537-545 with Ex. 28, R. 579-582).[2]

The minutes of the January 20, 1943, meeting above referred to states:

> "'Your Brokers' Committee, after due consideration, for the reasons cited below, respectfully suggests *the elimination of the boundary line distinguishing "suburban" and "city area"* insofar as payment of commission on the sale of real property is concerned." (R. 548, Italics ours)

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[1] Ex. 12 was excluded in the criminal case (R. 46) but admitted in the civil suit for such probative value as it might have. (R. 335).

[2] The alleged similarities claimed in the Government's Brief p. 20 seem plainly spurious. There is almost no similarity at all.

A special notice to all members dated January 22, 1943, (Ex. 19, R. 549) called a meeting for February 16, 1943, to consider the above. The minutes of that meeting show that the primary purpose was to eliminate the commission Boundary Zone. (See Ex. 20, R. 552-553) As the Boundary Zone prescribed rates, the only way to abolish the Boundary Zone was to change the rates, which the members did, exactly as recommended by their own committee and directors. (Ex. 18, R. 548; Ex. 20, R. 552-554).[1] The amended motion adopted by the members abolished the Boundary Zone and adjusted the commission rate to provide for a commission of 5% up to $50,000 and 3% on any excess above $50,000 for sales in the District of Columbia and the adjacent Metropolitan area. (R. 552, 554).[2] On February 17, 1943, the Secretary sent to all members a Special Bulletin (Ex. 21, R. 555) which commences:

> "*Placing the entire District of Columbia into one commission zone* was accomplished this week when members of the Washington Real Estate Board for-

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[1] It is no answer for the Government to claim that abolition of the Boundary Zone was changed into a straight rate-fixing agreement on the ground the rates were changed *upward*. The Government's theory of the case was that any change, upward or downward, even a reduction to 1%, would violate the Sherman Act. (See Statement of Government attorneys June 2, 1948, Tr. p. 727-8; 744; also statement at R. 179). Further there is no proof the change was upward. The Court found as a fact (Fng. 10, R. 433-4), that the revision resulted "in higher charges in many instances and lower commissions in other situations."

[2] The minutes recite a comparison with rates in other large cities:

"Philadelphia	5% straight—no ceiling.
St. Paul	5% straight—no ceiling.
Syracuse, N. Y.	5% straight—8% beyond 7 miles from center of city.
Chicago	5% to $100,000.—3% above.
Kansas City	5% to $100,000.—3% above.
Columbus, Ohio	5% to $100,000.—4% above.

'It will be noted that the suggested change, eliminates the theoretical boundary line but at the same time fixes the District of Columbia rate a great deal more favorable to the property owner than in any city above named.'" (R. 554)

mally agreed to the *elimination of the two commission boundary zones* which have been in existence for more than 20 years." (Italics ours)

No atmosphere of conspiracy surrounded the abolition of the Boundary Zone and the adoption of new rates in replacement. The Court below so held in its opinion (R. 438) and in its Findings of Fact found:

> "8. There is nothing clandestine or surreptitious about this activity of the Washington Board." (R. 433)

The Government concedes this in its Brief p. 6-7.

C. Effect of Abolishing the Boundary Zone:

The Court below made a Finding of Fact that on the abolition of the Boundary Zone February 16, 1943, the change in the commission rates resulted "in higher charges in many instances and lower commissions in other situations". (Fng. 10, R. 433; Op. R. 438). Thus prior to the abolition of the Boundary Zone an apartment house on Connecticut Avenue in Cleveland Park selling for $100,000 would result in a commission of $5,000. After abolition of the Boundary Zone in 1943 the commission would be $4,000. On the other hand, a store on F Street selling for the same price prior to the end of the Boundary Zone would involve a commission of $3,100, i. e. 5% on the first $5,000 and 3% on the excess. After the change of 1943, the commission would be $4,000, namely 5% on the first $50,000 and 3% on the excess.

The Court below found as a fact:

> "13. There is no proof that the standard rate of commissions published by the Washington Real Estate Board is unreasonable or that this activity unduly or unreasonably restrains competition between brokers, or *adversely affects the sale of real estate.*" (Fng. 13, R. 434, Italics ours).

In its Conclusions of Law the Court held:

> "1. The action of real estate brokers in publishing a standard rate of commissions charge for their services does not alone and of itself create an unreasonable restraint of trade in violation of the Sherman Act, in the absence of a showing that such rates were unreasonable or oppressive in themselves or that they result in a substantial diminution of competition or otherwise create an unreasonable restraint of trade or commerce. There is no such showing *or such a contention in this case.*" (Concl. of Law 1, R. 435, Italics ours)

D. Right to Abolish the Boundary Zone:

The evidence is uncontradicted that the Boundary Zone, which existed eleven years before the Washington Board was organized, was inequitable and a constant source of irritation to owners and brokers alike. The question now is: did the members of the Washington Board have the right to abolish it as a yard-stick in offering their services to the public? For that is what the Schedule of Standard Commissions of 1943 amounts to: it is a public notice to the effect that the members of the Board offer to perform services for principals at the rate set forth. (Fng. 17, R. 434) We will show later that the rate was non-mandatory and subject to mutual agreement. (See present Brief *infra*, P. 24). The Court below so held (Fng. 11, 16, R. 434).

It is difficult for us to believe at this late date that a group of men violate the Anti-trust Acts when they choose to rid themselves of an inequitable and archaic method of making charges for services inherited from an earlier generation. It is self-evident that in abolishing a Boundary Line which determines rates this side and the other side of it, brokers must substitute new rates or have no schedule at all. But this does not constitute illegal price fixing. It must be remembered that all the members have done is to agree among themselves to *offer* to perform personal serv-

ices at a standard rate (Fng. 17, R. 434)—an offer subject to bargaining and acceptance or rejection. The offer is made by a group of 250 realtors[1] out of 3,525 brokers licensed in the District. (R. 267) There can be no claim of monopoly or unreasonable restraint. (Fng. 12; Concl. of Law 1, R. 431-434) The owner, if he does not wish to pay the standard commission or strike a bargain, can obviously go elsewhere. The Government's suggestion in its Brief, p. 25, 56-57, that real estate brokers should go to Congress to get the Boundary Zone abolished or to tell them what price they should ask for our services can hardly be taken seriously.

Equally frivolous, we think, would be the stock contention that what brokers can do singly they cannot do as a group. (See *Eastern States Lumber Assn.* v. *U. S.*, 234 U. S. 600, 614.). The Boundary Zone was a trade practice which the Board took "as is" when it was organized. When it proved increasingly inequitable and unworkable the Board had the right to deal with it as a Board. It was fairly within the purposes for which the Board was organized; its clarification was clearly in the public interest. An abandonment of the Boundary Zone without a new schedule of standard rates would produce the very "chaos" and "confusion" the Court below found. (Fng. 14, R. 434)

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[1] Only a member of a Real Estate Board affiliated with the National Association of Real Estate Boards has the right to use the name "realtor." (Ex. 1, R. 454; Ex. 7, R. 488)

The members of the Washington Board, as their small number indicates, were a select group. The Board exercised great care in admitting agents to membership (R. 90-93) and maintains elaborate and unique facilities for their use and the use of the public. (See testimony of Mr. Rush, Executive Secretary, R. 29, 84-97; See Const. Ex. 3, R. 462) Among these facilities are a complete card index of owners containing 185,000 cards, posted to 48 hours (R. 29, 96); elaborate plat books, zoning maps, kept up to date; an apartment house file, an index of all building permits and "Statistical Data" of deeds recorded. (R. 94-97)

E. The Right to Offer Personal Services at Standard Rates; Sec. 6 of the Clayton Act:

One of the inherent difficulties of the Government in the present case is its inability to put its finger on precisely what segment of trade or commerce is, or could be, restrained. The Schedule of Standard rates constitutes an offer to perform services at the rates specified. (Fng. 17, R. 434) Is it the trade of "making offers" to perform personal services which is restrained? If not where is the "trade"? All the members of the Washington Board have done is to agree to offer to perform, *in futuro*, personal services in particular transactions at certain standard rates. (Fng. 17, R. 434) The Government concedes, Brief p. 58, that brokers operate pursuant to a series of independent contracts, each with a separate customer (see Gov. Ex. 26, R. 575), which raises the question whether there was any "trade" at all in the usual sense.

Up to now neither Congress nor the Courts have undertaken to prevent a man trying to get as much for his labor as sees fit. This would appear to be the ordinary right of free men. So far, a man has had the right to refuse to work until his price is met. This principle is enshrined in the Declaration of Independence (see *Allgeyer* v. *La.*, 165 U. S. 578) and is the announced policy of the labor legislation of the last decade, such as the *Wagner Act*, the *Norris-La Guardia Act* and the *Taft-Hartley Act*.

In the Anti-trust field it is contained in Sec. 6 of the *Clayton Act* which provides:

> "The labor of a human being is not a commodity or article of commerce." (15 U. S. C., Sec. 17)

The Government reads out this provision on the ground no employer-employee relationship is involved in the present case. (Gov. br. p. 58) But the quoted provision clearly has a wider application. It announces, as held in *U. S.* v. *Hutcheson*, 312 U. S. 219, see also *Apex Hosiery Co.* v.

Lie[illegible] 310 U. S. 469, 502-503, a rule of public policy, which [illegible] now, as the Court below noted, all courts and even the Executive Branch have heeded. (Op. below, R. 439)

The Court below, after holding the price fixing doctrine had never been invoked to charges for personal services, referred to the above quotation from Sec. 6 of the Clayton Act as follows:

> "This is a very important, basic pronouncement. The term 'labor' as used in the Clayton Act is not limited to the work of manual laborers or of mechanics. It comprises intellectual labor as well. Neither is the term restricted to the work of the poor or the needy. Thus there are labor unions of mechanics, of clerks, of teachers, and of airplane pilots. Many other similar instances might be adduced. All of these organizations fix wages or salaries to be charged by their members. Such activities have never been held to form violations of the Sherman Act *per se*.
>
> A real estate board may in a sense be likened to a labor union of real estate brokers. Admittedly there is no case in the Federal courts that has applied to personal services the rule that the fixing of prices of commodities or articles is *per se* an unreasonable restraint of trade. *To contract for one's personal services is a fundamental right of every man.* For men to combine to regulate the compensation to be charged by them for their own services is also entirely legal. While this right has been generally recognized in respect to persons who toil for wages or salaries, no reason appears discernible why it is not equally applicable in principle to those persons who work for commissions. The instant case appears to be the first occasion in the history of the enforcement of the Sherman Act that Government has challenged this right.
>
> "It is a matter of common knowledge that rates of commissions for brokers' services of various kinds have been openly prescribed by numerous organizations of brokers for a great many years. This activity has never been condemned as violative of the Sherman Act, and the Government has never so contended prior to this case. On the contrary, the resulting

stabilization of charges and the consequent uniformity has generally been considered as being in the public interest. No reason is perceived for changing these principles as they have been heretofore understood." (R. 439, Italics ours).

The Court below distinguished between commodities and personal services. (R. 439) If it be argued that in the price fixing of commodities all a man does is to offer his wares at a given rate, but still, they say, this is price-fixing, the answer is that any such agreement as to commodities works toward restraint and monopoly. Where, however, a minority group of men agree to offer their personal services at a given rate, the agreement does not tend toward an illegal restraint but toward the protection of a natural right. Also, where commodities are involved higher prices tend toward diminished trade. Where, on the other hand, personal services are involved the higher the brokers commission the more the broker will work and the more real estate he will sell.

We make the broad contention, necessary to avoid the philosophy of a Totalitarian State, from which all rights allegedly flow, that workers not only have the right to strive to increase their own wages but to join with others in that effort. We say this is their right naturally and not by any license or work-permit from the State. We think the Government, in its happy and headlong way, is getting into very deep water indeed when, in the present ill-chosen litigation, it attempts to abridge that right.[1]

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[1] In *Allgeyer* v. *La.*, 165 U. S. 578, this Court said:

"The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence . . . This right is a large ingredient in the civil liberty of the citizen."

See also Haines "*A Revival of Natural Law Concepts in State and Federal Judicial Decisions*," p. 82, 83; *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418, 439, making clear that the law merely "recognized" a pre-existing right. The right to organize is no more conferred by the Federal law than the right of free speech.

As Judge Chase said in his dissenting opinion in *Gardella* v. *Chandler*, 172 F. 2d 402, 406, with reference to a baseball player:

> "His services, or ability to work, are not subjects of trade or commerce within the anti-trust acts. Indeed, in Sec. 6 of the Clayton Act, 15 U. S. C. A. par 17, it is stated that, 'The labor of a human being is not a commodity or article of commerce.' Although this, to be sure, was inserted for a purpose not here germane it shows nevertheless that Congress did not intend in the anti-trust acts to cover restraints upon employment."

Since *Hopkins* v. *U. S.*, 171 U. S. 578, and *Anderson* v. *U. S.*, 171 U. S. 604, the Government has never proceeded against individuals who, acting without contact with outside groups (see *U. S.* v. *Hutcheson*, 312 U. S. 219; *Allen Bradley Co.* v. *Local Union*, 325 U. S. 797; *U. S.* v. *Borden Co.*, 308 U. S. 188), attempted to improve their wages, hours of labor, etc. The historic controversy as to whether the Sherman Act intended to exclude labor entirely (see Louis Boudin "The Sherman Act and Labor Disputes", 39 Col. L. Rev. 1283; 40 Col. L. Rev. 14; Berman "Labor and the Sherman Act"), thought to have been settled by the Clayton Act (prior to *Duplex Printing Press* v. *Deering*, 254 U. S. 443) has now *in fact* been settled by *U. S.* v. *Hutcheson*, 312 U. S. 219, which synthesizes the various labor laws into a consistent public policy. The *Hutcheson* case applies the test of self-interest, without combination with non-labor groups, to efforts of individuals to raise or maintain their wages or working conditions. The necessary implications from this Court's decision in *U. S.* v. *Hutcheson* outlaw any effort by the Government to restrain individuals in an association from doing nothing more than attempting to fix the wages at which they will work. Such efforts cannot, from the *Hutcheson* case on, constitute violations of the Anti-trust Acts.

The *Hutcheson* case was approved in *Allen Bradley* v. *Local Union*, 325 U. S. 797, which, after reviewing the history of labor legislation and its interpretation, once more stressed the doctrine of immunization of activities of labor groups when not combined with non-labor groups.

We do not believe that in order to come within the public policy of Sec. 6 of the Clayton Act it is necessary that an employer-employee relationship be the "matrix of the controversy",[1] a rule which is limited to the existence of a "labor dispute". It is common knowledge that "white collar" workers are not ordinarily organized in unions. Nevertheless, in justice, they should come within the public policy of Sec. 6. Otherwise, there would be a clear discrimination in favor of manual labor groups at a time when many of the latter are better off economically than the "white collar" workers. The Sherman and Clayton Acts are not to be construed as class legislation discriminating against the great middle-class.

The present case comes within the spirit of *U. S.* v. *Hutcheson, supra*. See *NLRB* v. *Hearst Publ.*, 322 U. S. 111; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552; *Drivers Union* v. *Lake Valley Co.*, 311 U. S. 91; *Bakery Drivers* v. *Wohl*, 315 U. S. 769; *People* v. *Gassman*, 295 N. Y. 254; 66 N. E. (2) 705; *Allen Bradley Co.* v. *Local Union*, 325 U. S. 797.

It is unnecessary for defendants to argue that the Washington Board is technically a "labor union." It is sufficient that Section 6 states that the labor of a human being is not a commodity or article of commerce. Cases such as *U. S.* v. *Second Vaccum Co.*, 310 U. S. 150, holding

[1] The holding in *Amer. Med. Assn.* v. *U. S.*, 130 F. (2) 233, 242, that this relationship must be the "matrix of the controversy" dealt with whether a technical "labor dispute" within the meaning of the Norris-La Guardia Act was presented. The Court did not deal with the public policy of Sec. 6 of the Clayton Act. Nor did the case involve wage-fixing. The same is true of the affirmance, *Am. Med. Assn.* v. *U. S.*, 317 U. S. 519.

that price-fixing is illegal *per se*, deal with commodities or articles of commerce. They are no authority for holding that wage-fixing is illegal *per se* or illegal at all. On examination, the Government's theory of the case, i. e., price fixing, shows palpably nothing but wage-fixing. What has been fixed? The price of services. What is the price of services? The answer is wages. Back of all this is the fact that, at most, defendant simply agreed upon the asking-price for their services.

F. The Hopkins and Anderson Cases:

These cases are pilloried by the Government as having been overruled by this Court in *Stafford* v. *Wallace*, 258 U. S. 495, 523-524; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 230. (Gov. brief, p. 47, footnote 21.) On the other hand, they have been widely interpreted as holding that personal services are outside the scope of the Anti-trust Acts. See *Teller, Labor Disputes*, Sec. 190, p. 564. The two cases are carefully analyzed in Louis Boudin's "*The Sherman Act and Labor Disputes*", 39 Col. Law Review 1507.

This Court has never overruled these cases insofar as they deal with personal services; it is as to the nature of interstate commerce and the extent of the commerce clause that they are criticized. The cases above cited show this; see also *Wickard* v. *Filburn*, 317 U. S. 111, 121-122, Note 20. The gist of the holding in *Anderson* v. *U. S.*, 171 U. S. 604, is that an agreement between livestock traders not to do business with non-members was not a direct restraint on interstate commerce but a reasonable regulation of their own business. (See Anderson Op. p. 615-616). The basis of the decision in *Hopkins* v. *U. S.*, 171 U. S. 578, was that fixing livestock brokers' commissions was likewise not a direct restraint on interstate commerce because the business of the brokers was merely to furnish an aid or facility to such commerce. This was the theory on which the

Court decided the criminal case brought against the present defendants. (R. 306). The Court there said:

> "In my view the charges of a real estate broker on account of his personal services are nothing more than charges for *aids or facilities* furnished to clients whereby their objects may be the more easily and readily accomplished. . . . I feel that charges for services of this character and nature do not immediately touch upon or act upon nor do they directly affect the sale of real estate in the District of Columbia." (Op. Curran, J., R. 307, Italics ours)

The Court notes that "indirectly and as an incident they may enhance the cost to the owner of real estate . . . but they are not, in my opinion, charges which are directly laid upon real estate itself. Rather are they charges for facilities given or provided to clients in the course of the sale of real estate." (Op. Curran, J., R. 307-308) The Court cited with approval the *Hopkins* and *Anderson* cases and *State* v. *Duluth Board of Trade*, 107 Minn. 506.

Other cases showing personal services are outside the Act are:

People v. *Gassman*, 295 N. Y. 254; 66 N. E. (2) 705.
Hart v. *Keith Vaudeville Exchange*, 42 F. (2) 341.
Federal Baseball Club v. *National League*, 259 U. S. 200.
Sperry & Hutchinson Co. v. *Fenster*, 219 F. 755.
State v. *Duluth Board of Trade*, 107 Minn. 506.
Harelson v. *Tyler*, 281 Mo. 383.
Post v. *Bucks Stove & Range Co.*, 200 F. 918.
Hunt v. *Riverside Corp. Club*, 140 Mich. 538.
American League Baseball Club v. *Chase*, 86 Misc. 441.

An exceptional case, *More* v. *Bennett*, 140 Ill. 69, 29 N. E. 888, decided in 1892, held that an association of stenographers could not legally fix their own fees. The case was decided prior to the *Anderson* and *Hopkins* cases and prior to the Clayton Act. It has been cited only twice in the Federal Courts, in 85 F. at 285 and 242 F. at 473.

G. The Per Se Rule As to Price Fixing:

The Government's principal reliance in its brief, P. 43 *et seq.* is its claim that price fixing is always illegal *per se* on the basis of cases such as *U. S.* v. *Socony-Vacuum Oil* Co., 310 U. S. 150. The Court below held there was not even a contention the rates herein were unreasonable. (Concl. of Law 1, R. 435) [1]

We have already made the point that where personal services are involved price fixing of personal services is simply wage fixing. It is difficult to have much patience with the Government's threnody that "price fixing is always illegal *per se*". A moment's reflection suggests that in the whole vast field of labor relations (not immune from the Anti-trust Acts; see *Allen Bradley Co.* v. *Local Union*, 325 U. S. 707) the statement is palpably untrue. As is well known, unions every day in the week "conspire" to fix the price of wages. It is not quite an answer for the Government to claim that this is because of permissive authority contained in the *Wagner Act, Norris-La Guardia Act, Taft-Hartley Act, etc.* We claim that it is an inherent right of workers to agree with their fellows as to the price of their toil. Any other view went out of fashion about the time the courts decided that labor unions, strikes, etc., were not actionable conspiracies [2] though we will admit there is a wilful group of Statists who would like to revive the idea that the right of workers to act collectively is a right, like everything else, they say, derived from the State. But in any event the statement "Price fixing is illegal *per se*," which runs like a Wagnerian leit-motif through so much of the Government's thinking, is a mere general statement which must be limited to the facts and

[1] In a colloquy with Government Counsel, the Court said: "You conceded you had no proof that the rate was unreasonable." (R. 350)

[2] See *Frankfurter and Greene, The Labor Injunction*, Chap. 1; *Great, Attitude of American Courts in Labor Cases*, 42 Col. Univ. Studies, p. 36-38; *Teller, Labor Disputes*, Sec. 60.

circumstances in the particular case. A wise Frenchman, Larochefoucault, once remarked, "All general statements are untrue, including this one." Along the same line, this Court in *Armour & Co. v. Wantock*, 323 U. S. 126 stated:

> "words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the court. General expressions transposed to the facts are often misleading."

We follow the Court below when it states that the *per se* shibboleth has never been invoked to charges for personal services. (Op. R. 439-440)

The cases cited by the Government in its brief, page 46-47, to support its contention that personal services are within the *per se* rule are not in point. The conspicuous fact is that in all these cases physical things were involved and there was an article akin to a commodity either moving in interstate commerce as in *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290, or an article worked upon and transported within the District of Columbia as in *Atlantic Cleaners & Dyers, Inc. v. U. S.*, 286 U. S. 427. This distinction clearly applies to cases such as *U. S. v. Socony-Vacuum Co.*, 310 U. S. 150; *U. S. v. Line Material Co.*, 333 U. S. 287. In *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131, physical films were involved. *Gardella v. Chandler*, 172 F. (2) 402, the baseball case, and *Ring v. Spina*, 148 F. (2) 647, involved circumstances showing substantial physical resultants in interstate commerce. In *U. S. v. South Eastern Underwriters Association*, 322 U. S. 533, the case did not turn upon personal services. The insurance referred to involved use of vast aggregations of capital in exploiting which personal services were purely incidental. In the present case, it is clear that any use of capital would merely lead up to the ultimate moment when a real estate broker, having found a prospect, would

proceed by personal salesmanship to sell him the property. The fact that certain members of the Washington Board were incorporated (see List Ex. 3, R. 598) does not, as contended by the Government in its brief, page 48, prevent their services being personal. Although the business may have been carried on in corporate form the end-result would, in every case, involve personal services.

Atlantic Cleaners & Dyers v. *U. S.*, 286 U. S. 427, does not govern the present case. The defendants there were corporations and their officers in the business of dyeing and cleaning for profit. The article of commerce was the dyed or cleaned garment which was re-delivered to the customer. Further, an allocation of territory was present. No question was involved of the wages of the individual dyers and cleaners who did the work. In any event Section 6 of the Clayton Act, as interpreted in *U. S. v. Hutcheson*, 312 U. S. 219, grants immunity under *all* provisions of the Anti-trust Acts, including the coverage of Section 3 of the Sherman Act as expanded in the *Atlantic Cleaners & Dyers* case.

Likewise the state court cases cited by the Government on page 45 of its brief, footnote 20, to the effect that price fixing of services violates state anti-trust laws show conspicuously, that physical things were the end-result of the so-called services. Thus, stenographers produce a transcript, blacksmiths a horseshoe, plumbers plumbing, livery men horses, printers a book, etc. In the present case, real estate brokers produce nothing but a contract between the buyer and the seller of which the written page is merely the evidence.

H. Offering Price of Services in Schedule Was Non-Mandatory:

It seems self-evident that as the Schedule of Standard Commissions simply published an *offer* on the part of realtors to perform services at a certain rate (Fng. 17, R. 434) it

was, in the nature of things, non-mandatory. The owner could accept or refuse the offer as he saw fit. This was specifically held by the Court below which said that the rates in the Schedules "have been construed by the members as non-mandatory in character, and as setting forth a basis upon which to establish fair compensation for services performed." (Fng. 16, R. 434)

The Government, in its brief, p. 32, says this finding was apparently based on the evidence that the Board had never penalized members for failure to adhere to the Schedule. We differ and think there were other substantial bases for this finding.

First, the Schedule of Standard Commissions, Ex. 25, R. 569, states that the *standard* commission on sales of real estate shall be thus and so. There is a certain good sense inhering in the word "standard", which suggests that the commission may be more or less depending on whether the transaction departs from standard. (R. 137). The Code of Ethics of the Washington Board in Ex. 5, R. 478 provides:

> "Brokers should maintain the standard rates of commission adopted by the Board and no business should be *solicited* at lower rates." (Italics ours)

This provision is palpably non-mandatory in form and simply suggests that brokers "should" maintain the rates. The provision existed since 1934 (R. 99); long before the Schedule of Standard Commissions of February 16, 1943 was adopted. (Ex. 28, R. 578; see R. 107-108).

Mr. Charles J. Rush, Secretary of the Washington Board since 1932 (R. 29), testified in answer to questions by the Court that there was nothing whatever to prevent a broker charging anything he wanted; that it was a matter of private agreement (R. 123-124). Deals were frequently made on the basis of the broker taking less than his commission and this happened all the time. (R. 24). As to

what happened in that event in the nature of reprisals, the answer was "nothing". (R. 124). The Court asked the following questions:

> "THE COURT: So that even though the Board has in its Code of Ethics these schedules, there is nothing to prevent a real estate broker who is a member of the Washington Board from going out and, as a matter of fact, charging any commission he sees fit, is that right?
>
> "THE WITNESS: That is right, sir." (R. 124).

No member had ever been disciplined or suspended or expelled. (R. 132-133). Mr. Rush further testified:

> "Q. So that, notwithstanding all this we have heard with reference to the fixing of fees, isn't it true that the individual broker in an individual transaction can charge any commission to which the seller or the purchaser agrees?
>
> "A. It is always a question of agreement, yes, sir.
>
> "Q. And of an individual agreement in each individual case?
>
> "A. Every case is an individual one.
>
> "Q. And you exercise no control over what the individual broker does with his individual commission?
>
> "A. No, sir.
>
> "Q. And you know that to be a fact, don't you?
>
> "A. Mr. Leahy, I have been doing this work for 25 years, sir. I do know that is the truth." (R. 124-125).

The members took less than the standard rate in innumerable instances. (R. 128). The standard rates of commission were used by members and non-members alike. (R. 137-138). The standard rates were furnished for the information of the public as representing what the Washington Board thought was fair compensation and as a standard which should be observed in the ordinary case. (R. 137-138). It was common knowledge that the standard was not observed in many cases. The court at one time fixed

the rate at less (R. 138). Where 50 or 60 houses were built the brokerage fee was less, (R. 138), sometimes $100 per house, regardless of cost. (R. 139). No member was ever disciplined for this or for failure to adhere to the standard charges. (R. 139).

Mr. Rush's testimony was supported by two Government witnesses, members of the Washington Board. Mr. J. Garrett Beitzell, Vice-President and a director of the Washington Board, testified that he never even used the standard form of contract of the Washington Board but used his own form. (R. 261). The commission rate was always subject to agreement between the parties; he never considered himself bound by the Code of Ethics to charge any given rate. This was general practice (R. 261), as he stated:

> "We discuss every deal; every deal stood on its own. We discussed what the man would have to pay. He would want to know how much net he would give so he was thoroughly familiar with the contract." (R. 261, 262).

After talking it over, the seller was willing to pay what was fair and reasonable, which was sometimes 5% and 3% and sometimes not. If he felt he was losing money on a piece of property, the agent adjusted the commission to meet the conditions and that was known to the Washington Board. (R. 262). He made statements at directors' meetings on a number of occasions that he had taken less than the regular commission. (R. 262). Taking less than the so-called standard was discussed very frequently with other members of the Board. Mr. Beitzell said:

> "In fact, I don't think there was any one of them who hadn't done it at one time or another. That was common knowledge among the Board." (R. 263).

It was common knowledge that the broker negotiated the rate of commission in each individual case with each individual purchaser or seller. (R. 263). There had never

been any disciplinary action for so doing. (R. 263). As a member of the Board for fifteen years, Mr. Beitzell testified that the so-called standard rate was the recommended rate generally admitted by custom and the courts to be the fair standard of compensation in the ordinary everyday real estate transaction. (R. 264). It was a yardstick or standard but it was left to the individual broker to arrange his own commission in each individual case. After February 1943, this was specifically recognized. (R. 264). He did not construe the Code of Ethics to restrict the members in the right to negotiate their own commissions as the business demanded. Mr. Beitzell confirmed Mr. Rush's testimony as to commissions on veterans' projects for which he charged $50.00 a deal. (R. 266-267). This was not unusual. (R. 267). Mr. Beitzell testified:

> "Q. So that in your entire experience of 15 years as a member of the local board, have you at any time ever found that the interpretation of the ethics was to the effect that they fixed commissions, in effect that they fixed your commission which you were negotiating with your purchaser or with your seller at any individual time?
>
> "A. I have never heard that question come up the whole time I have belonged to the board; not one time.
>
> "Q. And the practice among the members has been to the contrary, hasn't it?
>
> "A. It has, definitely." (R. 267)

As to the National Association, the witness never considered members of the Washington Board were bound by any provision of the Code of Ethics of the National Association to adhere to any particular scale of commissions. (R. 268) The arrangement with the National Association had never been construed to prevent a member negotiating his own individual contract. (R. 268).

Another Government witness, Mr. J. Wesley Buchanan, a member of the Washington Board since 1931 (R. 274) and a director, testified that members generally adhered

to the rate schedule on standard or usual deals. (R. 277). There was never any policing of the commission rates on the part of the National Association. (R. 282). He had never heard of any communication on the subject from the National. (R. 282). The provision of the Code of Ethics as to observance of the commission rate represented an ideal. (R. 283). There was no "must" in respect to the commission rate. (R. 288). The schedule was publicly adopted for the benefit of the public as a representation of fair and adequate compensation. (R. 289) There was no thought of disciplinary action, (R. 39) nor was anything said or done by the National Association which compelled brokers to charge what was recommended in the schedule and no other rate. (R. 289). Each broker was always left free to contract with any member of the public with relation to any commission. (R. 289). The brokers freedom to act, with reference to a valuation put by him on his own services, was not taken from him. (R. 289). After adoption of the February, 1943, schedule, the members went along in the old way and negotiated each transaction freely with the owner (R. 289) and whatever agreement was struck was the agreement between the parties as to the commission rate. (R. 290). The rates were fixed by the individual member in the individual case with the individual customer. (R. 290). As to a standard rate, there was a difference between a standard deal and other deals. (R. 291). The Code of Ethics established ethical standards for the brokers in the interest of the public. (R. 291). Brokers always had the right to charge whatever each individually thought was fair and the Board never sought to control the broker in that respect. (R. 292). He knew of no such instance where the Board ever sought such control of the members. (R. 292). The rates were well known among the owners of property (R. 292-293) and have been followed by the courts as the regular rate. If conditions were such that the regular commission ought not to be adhered to, a

broker did not hesitate to make his own contract to cover the case; (R. 293).

Mr. Buchanan confirmed the other witnesses in respect of lower rates in G. I. cases. (R. 294).

We think the evidence is overwhelming that as held by the Court below (Fng. 16, R. 434) the Schedules of Standard Commissions were non-mandatory and simply set forth a basis upon which to estimate fair compensation for services performed. The Court's findings in this respect in no way depended, as the Government claims, on the bare fact that there was no penalty. (See Gov. brief p. 32). Under this Court's decision in *U. S. v. Yellow Cab Co.*, 94 L. Ed. Adv. 123, the Court's findings are unassailable. The mandatory or non-mandatory nature of the rates, read in connection with Sec. 3 of the Code of Ethics, (Ex. 5, R. 478) was specifically put in issue by the Washington Board by its Second Defense (R. 391-392) and Tenth (R. 391-2), Fourteenth and Fifteenth Defenses (R. 392-393). Defendants' Sixteenth Defense (R. 393) made a like contention with respect to Article 9 of the National Association's Code of Ethics. These defenses involve the crux of the case. The testimony below does not show mere non-observance of an agreement made; it shows the alleged agreement was different from what the Government contends it was.[1]

I. Appalachian Coals v. U. S. and Apex Hosiery Co. v. Leader Are Nearest the Present Case:

The case nearest the present is *Appalachian Coals v. U. S.*, 288 U. S. 344. In each case we have acts done "fairly and openly" (Gov. S. R. 433); in each case it clearly appears the acts done were regulatory in character and designed to remedy a situation inimical to the trade.

[1] As to oral testimony to show the background and meaning of corporate resolutions see Mr. Justice Rutledge's opinion in *Fox v. Johnson & Wimsatt, Inc.*, 127 F. (2) 729, 735 and authorities cited.

We think this Court could almost take judicial notice that it is in the public interest that the public should have some sort of authoritative guide as to what commission is proper in a real estate deal. It must be remembered that unlike buying and selling other things, the average man usually buys or sells real estate only once or twice in his life; yet, when he does so, the single transaction runs into substantial sums. Usually it is his home or his place of business that he sells. We ask the members of this Court to consider how often they themselves have bought or sold real estate and whether, lacking some dependable guide, such as a real estate Board's Schedule of Standard Rates, they would have any idea as to what a fair commission would be for the broker. Can it therefore be said, quoting from *Nash* v. *U. S.*, 229 U. S. 373, 376, that the alleged agreement herein is one "which by reason of intent or the inherent nature of the contemplated acts prejudices the public interests by unduly restricting competition." Applying "the essential standards of reasonableness" can it fairly be said that what defendants did was not "an honest effort to remove abuses"—or if not abuses, at least inequities inhering in the Boundary Zone.

The Court below found that:

> "Before the Board attempted to fix standard commission rates, there was chaos and confusion resulting in occasional excessive charges, and one of the purposes of the Board was to eliminate this undesirable condition." (Fng. 14, R. 434)

The Government contends in its brief, page 54, footnote 27, and page 10, footnote 6, that there is no evidence in the record to support the above finding. We have already shown that the rates of February 13, 1943, grew out of the chaos and confusion involving the Boundary Zone. (See present brief, p. 8). The Court itself (Judge Holtzoff) said: "I suppose it would be a terrible thing for the public if there was no standard rate." (Tr. June 27, 1949, p. 19). The Court (Judge Curran) in the

Criminal Case, said: "That's all I have been hearing for the past two or three days is that because of the confusion that existed in the industry that something ought to be done. . . ." (R. 171). Government Counsel himself stated: "We say they got together and said these rates throughout the country are topsy-turvy, people get confused." (R. 198).

We think that the above amply shows chaos and confusion in the industry, both with respect to the confusion resulting from the Boundary Zone (see present brief, p. 8) and in the industry generally. Certainly there is enough showing under *U. S.* v. *Yellow Cab Co.*, 94 L. Ed. Adv. 123, to resist the unsupported assertions to the contrary made by the Government in its brief, page 54, footnote 27 and page 10, footnote 6. The Government appears to forget that under the above case the burden is upon the *Government* to prove that findings of fact are clearly erroneous; they are not to be overturned by mere expression of disdain.

In addition to *Appalachian Coals* v. *U. S.*, *supra*, *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, is in favor of appellees. The Government cites it in its brief, p. 45, as holding that the Sherman Act applies to the marketing of "goods or services" which statement appears in the Court's opinion at p. 495 and 498. Nothing could be further from the fact than that "services" were involved in the *Apex* case. The *Apex* case involved a sit-down strike of workers in a factory. This Court in using the word "services" clearly referred to services such as those of railroads, etc., as footnote 16, p. 495 shows.

The case, however, is in point as holding that the Sherman Act admittedly does not condemn all combinations and conspiracies. (Op. p. 486). There must be some form of restraint upon commercial competition. (Op. p. 495). The Court below found as a fact that (Fng. 13, R. 434) there was no proof that the commercial rates were un-

reasonable or that this activity unduly or unreasonably restrains competition or adversely affects the sale of real estate. The Court in the *Apex* case said that "some form of restraint of commercial competition has been the *sine qua non*" and that the restraints must be "so substantial as to affect market prices." (Op. p. 500) The Court continued:

> "A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." Since the enactment of the declaration in par. 6 of the Clayton Act, 15 USCA, par. 17 that 'the labor of a human being is not a commodity or article of commerce . . . nor shall such (labor) organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the Anti-Trust laws,' *it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.*". (Op. p. 502-503) (Italics ours)

The above is an authoritative pronouncement of this Court as to the meaning of Sec. 6 of the Clayton Act and of itself ought to govern the present case.

Later in the same opinion (pp. 509-511) the Court holds that indirect restraints of physical products do not come within the scope of the Sherman Act where the conspiracy was not directed at that commerce. (p. 511). The Court held "that the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition." In referring to intent as a prerequisite to liability, the Court reiterated that the conspiracy "must be aimed or directed at the kind of restraint that the Act prohibits or that such restraint is

the natural and probable consequences of the conspiracy." (Op. 511).

It is our position that under *Appalachian Coals* v. *U. S.*, *supra, and Apex Hosiery Co.* v. *Leader*, *supra*, see also *Chicago Board of Trade* v. *U. S.*, 246 U. S. 231, with every possible concession to the Government, there was no actionable conspiracy herein.

II

The Judgment of Acquittal of Appellees National Association of Real Estate Boards and Washington Real Estate in Criminal Action No. 950-47 is Res Judicata in This Action as Between Appellant and All Appellees, So That Appellees Were Entitled to a Judgment in Their Favor Upon Their First Supplemental Defense.

We urge *res judicata* as an independent ground for affirmance. The judgment of acquittal in the criminal case (R. 310) resulted from defendants' motion to that effect made at the close of the Government's case. (R. 304).[1]

The defense of *res judicata*, based on the above judgment, was asserted in the civil case by Supplemental Answers (R. 417-422), upon which Motions for Summary Judgment were made by defendants (R. 420, 425) which the Court (Judge Goldsborough) denied. (R. 425-426). *Res judicata* was re-asserted at the trial below (Engs. 21-27, R. 434-435) and the defense overruled on final hearing. (Concl. of Law 4, R. 436). The Government correctly anticipated we would assert it here. (See Gov. Br., p. 62-72).

The doctrine of *res judicata* is deeply entrenched in our common law. It is based on the proposition that once the parties or their privies have litigated, or have had an opportunity to litigate, a cause of action or an issue of

[1] See Motion *verbatim* present Brief p. 55.

law or fact, and a court of competent jurisdiction has finally determined the cause of action or the issue, the parties and their privies are bound by the previous adjudication in any future litigation.

Commissioner v. *Sunnen*, 92 L. Ed. (Adv.) 673 (1948)

Scalfon v. *U. S.*, 332 U. S. 575.

Morris v. *Jones*, 329 U. S. 545 (1947).

Baldwin v. *Iowa State Traveling Men's Asso.*, 283 U. S. 522 (1931).

Southern Pacific R. Co. v. *United States*, 168 U. S. 1 (1897).

Cromwell v. *County of Sac*, 94 U. S. 351 (1876).

Brocy v. *Brown*, 74 App. D. C. 309, 122 F. 2d 219 (1941).

Bennett v. *Commissioner*, 113 F. 2d 837 (CCA, 5th, 1940).

30 Am. Jur., "Judgments" § 165.

2 *Black on Judgments*, 2d ed. (1902) § 609, p. 924.

See also the concurring opinion in *United States* v. *United States Gypsum Co.*, 51 F. Supp. 613, 615, 616 (D. C. D. C. 1943).

In *Southern Pacific R. Co.* v. *United States*, *supra*, this Court said:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.

> Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." 168 U. S. at 48-9.

The general principle is applicable with respect to two successive criminal cases, *United States* v. *Oppenheimer*, 242 U. S. 85, 3 A. L. R. 516 (1916), and is applicable in a civil case after the final determination of a criminal case *Local 167* v. *United States*, 291 U. S. 293 (1934); *United States* v. *Salen*, 244 Fed. 296, 298-9 (S. D. N. Y. 1917); *United States* v. *Warner Bros. Pictures*, 13 F. Supp. 614, 615-6 (E. D. Mo. 1936); with the exception of criminal cases ending in an acquittal *on the general verdict of a jury*. *Helvering* v. *Mitchell*, 303 U. S. 391 (1938); *United States* v. *Warner Bros. Pictures*, *supra*; but cf. *Coffey* v. *United States*, 116 U. S. 436 (1886); and *cf. Stone* v. *United States*, 167 U. S. 178 (1897).[1] In many ways the instant case is more nearly like the *Coffey* case than the *Mitchell*, since with respect to *corporations*, what amounts to a death sentence, that is dissolution can result from a civil anti-trust decree.

The Mitchell exception to the doctrine of *res judicata* is based on the impossibility ordinarily, of determination upon a record containing a criminal general jury verdict whether the issues were concluded favorably to the defendant or whether the defendant was acquitted because, although the government proved its case by a preponderance of the evidence, it did not prove it beyond a reasonable doubt. *Helvering* v. *Mitchell*, *supra*, 303 U. S. 402-3. The Court in that case was also impressed by the fact that defendants there could not have been forced to testify in the government's behalf in the previous criminal trial.

[1] Presumably a jury verdict. However, the issues of law and fact in the criminal and civil cases differed so that the *Stone* case is not in point. 167 U. S. 188-9.

Id., 303. But since the Court did not overrule *Coffey v. United States, supra,* which had applied *res judicata* in a civil case based on a jury verdict in a criminal case, *but differentiated it on the basis that there was no difference in the burden of proof, Id.*, 405-6, the *Mitchell* case merely stands for an exception to the general doctrine of *res judicata* when the impossibility of telling whether or not a general jury verdict is based upon a failure to prove the crime beyond a reasonable doubt makes it impossible for a court in a subsequent case to determine how the issues actually were decided in the prior criminal proceeding.[2] The instant case satisfies all the requirements of the *res judicata* doctrine, and does not fall within the very narrow exception to that doctrine laid down in the *Mitchell* case, so that all the Appellees are entitled to have judgment in their behalf upon their first supplemental defense of *res judicata.*

Identity of parties.

Appellant was plaintiff in Criminal Action No. 950-47 (R. 313), and was, therefore, a party and subject to the jurisdiction of the District Court. Appellees National Association of Real Estate Boards and Washington Real Estate Board were defendants in Criminal Action No. 950-47, (R. 313), so were likewise parties thereto. They each appeared generally in that action (R. 320) so were also subject to the jurisdiction of the District Court.

Appellee Nelson is the Executive Vice-President and Executive Secretary of Appellee National Association of Real Estate Boards (R. 365) and the remaining Appellees are directors of Appellee Washington Real Estate Board

[2] Mr. Justice Stephens in his concurring opinion in *United States v. United States Gypsum Co.*, 51 F. Supp. 613 at 628 (D. D. C. 1943) suggests that if the trial judge directs a verdict a similar exception to the rule may arise as upon a jury verdict, since the direction could have been on the issue of reasonable doubt, unless something in the record showed that it was directed upon different grounds.

(R. 366), and are also sued as representing all the members of Appellee Washington Real Estate Board (R. 366). Since parties *and their privies* may rely upon *res judicata*, the individual Appellee may rely upon this defense to the same extent as may the corporate Appellees. *Oklahoma* v. *Texas*, 256 U. S. 70 (1921); *Hartford L. Ins. Co.* v. *Ibs*, 237 U. S. 662 (1915); *Southern Pacific R. Co.* v. *United States*, *supra*. As this Court said in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 at 402 (1940):

> "Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, R. I. & P. R. Co.* v. *Schendel*, 270 U. S. 611, 620, 53 ALR 1265, 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be different, . . . and parties nominally different may be, in legal effect, the same.' A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them. *Cromwell* v. *Sac County*."

Identity of cause of action and issues.

The cause of action as well as the material issues of law and fact in Criminal Action No. 950-47 were the same as in the instant action. The alleged cause of action in both cases was a violation of Section 3 of the Sherman Act (15 U. S. C. A. §3). That these causes of action and, just as important, the issues of law and fact in Criminal Action No. 950-47 and the instant case were the same appears from a comparison of the indictment in the former (R. 313-319) with the complaint in the latter (R. 364-372). Both, incidentally, were filed the same day (R. 313, 364).[3]

Parallel columns will show the identity of the averments of the indictment with those of the civil complaint:

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[3] It is, of coure, immaterial to the doctrine of *res judicata* which action is filed first, the earlier judgment being controlling, *Chicago, R. I. & P. R. Co.* v. *Schendel*, 270 U. S. 611 (1926).

Indictment

1. National Association of Real Estate Boards (hereinafter referred to as "National Association") is hereby indicted and made a defendant herein. National Association is a corporation organized in 1908 and existing by virtue of the laws of the State of Illinois. It transacts business and is found in the District of Columbia. It is a national trade association comprised of (1) approximately 28,000 real estate brokers and others affiliated with the real estate business throughout the United States including the District of Columbia, and (2) approximately 800 local associations of real estate brokers and others affiliated with the real estate business throughout the United States including the District of Columbia.

2. Washington Real Estate Board (hereinafter referred to as "Washington Board") is hereby indicted and made a defendant herein. Washington Board is a corporation organized in 1928 and existing by virtue of the laws of the District of Columbia. It is a successor to an unincorporated association of real estate brokers known as Real Estate Brokers Association of Washington City, D. C., or-

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3. Defendant National Association is a corporation organized in 1908 and existing by virtue of the laws of the State of Illinois. It is a national trade association comprised of (1) approximately 28,000 real estate brokers and others affiliated with real estate business throughout the United States including the District of Columbia, and (2) approximately 800 local associations of real estate brokers and others affiliated with the real estate business throughout the United States including the District of Columbia. Defendant Herbert U. Nelson is and has been for many years Executive Vice-President and Executive Secretary of defendant National Association.

4. Defendant Washington Board is a corporation organized in 1928 and existing by virtue of the laws of the District of Columbia. It is a successor to an unincorporated association of real estate brokers known as Real Estate Brokers Association of Washington City, D. C., organized in the District of Columbia in 1913. Said Washington Board is a trade association with a membership consisting of approxi-

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ganized in the District of Columbia in 1913. Said Washington Board is a trade association with a membership consisting of approximately 250 real estate brokers and others affiliated with the real estate business, including several banks, building and loan associations, life insurance companies, and title companies, all doing busness in the District of Columbia. Washington Board and all members thereof are members of the National Association.

3. The acts alleged in this indictment to have been done by each of the defendant corporations were authorized, ordered or done by the officers and directors of each of said corporations.

4. Various persons not made defendants herein participated as co-conspirators with the defendants in the offenses hereinafter charged, and performed acts and made statements in furtherance of the effectuation thereof. These co-conspirators include (a) those who have been officers and members of the Washington Board and individuals who, from time to time, acted as the representatives of the members in meetings and other activities of the Wash-

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mately 250 real estate brokers and others affiliated with the real estate business, including several banks, building and loan associations, life insurance companies, and title companies, all doing business in the District of Columbia. Washington Board and all members thereof are members of the National Association.

7. Various persons not made defendants herein participated as co-conspirators with the defendants in the offenses hereinafter charged, and performed acts and made statements in furtherance of the effectuation thereof. These co-conspirators include (a) those who have been officers and members of the Washington Board and individuals who, from time to time, acted as the representatives of the members in meetings and other activities of the Wash-

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ington Board, and (b) those who have been officers, directors and members of committees of the National Association.	ington Board, and (b) those who have been officers, directors and members of committees of the National Association.
5. In 1946, approximately 19,000 parcels of real estate were sold and many thousands of leases of real property were made in the District of Columbia.	8. In 1946, approximately 19,000 parcels of real estate were sold and many thousands of leases of real property were made in the District of Columbia. Members of the defendant Washington Board have been and now are engaged in acting as agents for the sale, exchange, lease, and management of real estate for a commission or fee in the District of Columbia. These members control at least 50% of the total volume of said trade and commerce in the District of Columbia.
6. Members of the defendant Washington Board have been and now are engaged in acting as agents for the sale, exchange, lease and management of real estate for a commission or fee in the District of Columbia. These members control at least 50% of the total volume of said trade and commerce in the District of Columbia.	8. In 1946, approximately 19,000 parcels of real estate were sold and many thousands of leases of real property were made in the District of Columbia. Members of the defendant Washington Board have been and now are engaged in acting as agents for the sale, exchange, lease, and management of real estate for a commission or fee in the District of Columbia. These members control at least 50% of the total volume of said trade and commerce in the District of Columbia.

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7. Due to the transient nature of a large percentage of the population of the District of Columbia, a particular parcel of real estate or apartment may be sold, leased, or rented by a broker to a great number of purchasers, lessees or tenants within a short period of time. A brokerage commission or fee is realized from each such sale or lease.

8. Under present market conditions the demand for residential and commercial properties in the District of Columbia is greater than the available supply. Purchasers or tenants are readily available to brokers acting as agents for the sale or rental of residential and commercial properties in the District of Columbia. The compensation of said brokers is in the form of a commission determined by a percentage of the sales or rental price regardless of the nature and amount of services rendered by said brokers.

9. For many years up to and including the date of the return of this indictment, the defendants and their co-conspirators have been engaged in a combination and conspiracy to restrain the trade and commerce of the District of Columbia in the sale, ex-

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9. Due to the transient nature of a large percentage of the population of the District of Columbia, a particular parcel of real estate or apartment may be sold, leased, or rented by a broker to a great number of purchasers, lessees or tenants within a short period of time. A brokerage commission or fee is realized from each such sale or lease.

10. Under present market conditions the demand for residential and commercial properties in the District of Columbia is greater than the available supply. Purchasers or tenants are readily available to brokers acting as agents for the sale or rental of residential and commercial properties in the District of Columbia. The compensation of said brokers is in the form of a commission determined by a percentage of the sales or rental price regardless of the nature and amount of services rendered by said brokers.

11. For many years up to and including the date of filing this complaint, the defendants and others have been and now are engaged in a combination and conspiracy to restrain the trade and commerce of the District of Columbia in the sale,

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change, lease and management of real property and the improvements thereon, all in violation of Section 3 of the Act of Congress of July 2, 1890, as amended, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, that is to say:

10. The defendants and their co-conspirators have agreed upon and fixed rates of commission to be charged by the members of the defendant corporations in the District of Columbia for acting as agents in the sale, exchange, lease and management of real property and the improvements thereon.

11. The aforesaid combination and conspiracy, and the acts, agreements and understandings which formed a part of and were used in effectuation thereof, have

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exchange, lease and management of real property and the improvements thereon, all in violation of Section 3 of the Act of Congress of July 2, 1890, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act. Said unlawful combination and conspiracy is continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

12. By agreeing to observe and by observing the Constitution, By-Laws, Code of Ethics, and other rules of the Washington Board and of the National Association, as amended from time to time, and by performing the acts and engaging in conduct hereinbefore and hereinafter alleged, the defendants and their co-conspirators have continuously planned and acted together to discourage members of the Washington Board from charging rates of commission other than those fixed by said Washington Board.

13. The aforesaid combination and conspiracy, and the acts, agreements and understandings which formed a part of and were used in effectuation thereof, have

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been carried out by divers means and methods including those hereinafter described.	been carried out by divers means and methods including those hereinafter described.
12. For many years prior to January 1, 1947, the National Association had a Committee on Rates, Rules and Customs. One of the purposes of said Committee was to raise brokerage commission rates and achieve uniformity in said rates throughout the United States including the District of Columbia. Said Committee made studies of brokerage commission rates prevailing in various states of the United States and in the District of Columbia, and thereafter initiated a plan to raise rates of commission charged by various members of the National Association throughout the United States, including those doing business in the District of Columbia, and to achieve uniformity in those rates.	14. For many years prior to January 1, 1947 the National Association had a Committee on Rates, Rules and Customs. One of the purposes of said Committee was to raise brokerage rates throughout the United States including the District of Columbia. Said Committee made studies of brokerage commission rates prevailing in various states of the United States and in the District of Columbia, and thereafter initiated a plan to raise rates of commission charged by various members of the National Association throughout the United Sfates, including those doing business in the District of Columbia, and to achieve uniformity in those rates.
13. In accordance with the recommendations of the National Association, the Washington Board, as hereinafter set forth, increased the rates established in its schedule of commissions.	15. In accordance with the recommendations of the National Association, the Washington Board, as hereinafter set forth, increased the rates established in its schedule of commissions.
14. Members of the Washington Board agree as a condition of membership in the National Association to	16. Members of the Washington Board agree as a condition of membership in the National Association to

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abide by the Code of Ethics of the National Association. Article 9 of this Code requires each member of each local real estate board, including the Washington Board, to observe the schedule of commissions established by the local board of which each is a member.

15. Article 14 of the Constitution and By-Laws of the Washington Board provides that said Board may adopt specific rules of practice or "ethics" and that any such rules, when adopted, are binding on each member. In accordance with this provision, the Washington Board has adopted a schedule of commissions which fixes the standard rates of commissions to be charged by its members for acting as agents in the sale, exchange, lease and management of real property in the District of Columbia.

16. Section 3 of the Code of Ethics of the Washington Board provides:

> Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates.

All members of the Washington Board agree and

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abide by the Code of Ethics of the National Association. Article 9 of this Code requires each member of each local real estate board, including the Washington Board, to observe the schedule of commissions established by the local board of which each is a member.

17. Article 14 of the Constitution and By-Laws of the Washington Board provides that said Board may adopt specific rules of practice or "ethics" and that any such rules, when adopted, are binding on each member. In accordance with this provision, the Washington Board has adopted a schedule of commissions which fixes the standard rates of commissions to be charged by its members for acting as agents in the sale, exchange, lease and management of real property in the District of Columbia.

18. Section 3 of the Code of Ethics of the Washington Board provides:

> Brokers should maintain the standard rates of commission adopted by the Board and no business should be solicited at lower rates.

All members of the Washington Board agree and

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have agreed as a condition of membership to abide by this Code of Ethics, and in accordance therewith, said members adhere and have adhered to the schedule of commissions established by the Washington Board.

17. On February 16, 1943 the schedule of commissions which had been in effect for several years, was revised by the Washington Board and the members thereof agreed to adhere and have generally adhered to the new schedule. This revised schedule substantially increased the commission rates required to be charged by the members of said Washington Board.

18. The schedule of commissions of the Washington Board which had been in effect prior to February 16, 1943, required each of its members, when acting as agent in the sale of real estate in the Washington city area, which included most of the District of Columbia, to charge a rate of commission of 5% on the first $5,000 of the sales price, and an additional 3% on the excess above $5,000.

19. On February 16, 1943 a new schedule increasing these rates was approved

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have agreed as a condition of membership to abide by this Code of Ethics, and in accordance therewith, said members adhere and have adhered to the schedule of commissions established by the Washington Board.

19. On February 16, 1943 the schedule of commissions which had been in effect for several years, was revised by the Washington Board and the members thereof agreed to adhere and have generally adhered to the new schedule. This revised schedule substantially increased the commission rates required to be charged by the members of said Washington Board.

20. The schedule of commissions of the Washington Board which had been in effect prior to February 16, 1943, required each of its members, when acting as agent in the sale of real estate in the Washington city area, which included most of the District of Columbia, to charge a rate of commission of 5% on the first $5,000 of the sales price, and an additional 3% on the excess above $5,000.

21. On February 16, 1943 a new schedule increasing these rates was approved

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at a special meeting of the Washington Board. This schedule provided in part as follows:

> The commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000 and 3% on the excess above $50,000.

22. In addition to the provisions in the schedule fixing rates of commission on sales of real estate, the Washington Board issues a standard form sales contract which is generally used by real estate brokers in the District of Columbia. This contract contains the following provision with respect to rates of commission:

> The seller agrees to pay to Agent the regular rate of commission fixed by the Washington Real Estate Board.

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at a special meeting of the Washington Board. This schedule provided in part as follows:

> The commission on all sales of real estate within the District of Columbia shall be 5% of the sales price up to and including $50,000 and 3% on the excess above $50,000.

20. In addition to the provisions in the schedule fixing rates of commission on sales of real estate, the Washington Board issues a standard form sales contract which is generally used by real estate brokers in the District of Columbia. This contract contains the following provision with respect to rates of commission:

> The seller agrees to pay to Agent the regular rate of commission fixed by the Washington Real Estate Board.

The remainder of the Indictment, paragraphs 21 and 22, dealing with "Commission Rate Fixing on Exchanges of Real Estate" are identical with paragraphs 23 and 24 of the Complaint, under the same title; paragraphs 23 and 24 of the Indictment, under the heading "Commission Rate Fixing on Leases" are identical with paragraphs 25 and 26 of the Complaint, under the same heading; paragraph 25 of the Indictment under the heading, "Commission Rate Fixing on Management of Real Estate" is identical

with paragraph 27 of the Complaint under the same heading. The "Effects of Offenses Charged" in the Indictment and in the Complaint are identical as follows:

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26. The aforesaid combination and conspiracy, agreements, understandings and concert of action hereinbefore alleged, have had, as intended by the defendants, the following effects:	28. The aforesaid combination and conspiracy, agreements, understandings and concert of action hereinbefore alleged, have had, as intended by the defendants, the following effects:
(a) Competition between members of the defendants in determining fees to be charged for selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia has been eliminated.	(a) Competition between the individual defendants (other than Nelson) in determining fees to be charged for selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia has been eliminated.
(b) The amounts paid for commissions to brokers for the sale of houses in a large part of the District of Columbia have increased 25% to 50%.	(b) The amounts paid for commissions to brokers for the sale of houses in a large part of the District of Columbia have increased 25% to 50%.
(c) The activities and business policies of real estate brokers engaged in selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia have been actively and effectively restricted and dominated.	(c) The activities and business policies of real estate brokers engaged in selling, exchanging, leasing and managing real property and the improvements thereon in the District of Columbia have been actively and effectively restricted and dominated.

From the foregoing it is apparent the causes of action and the issues of law and fact are identical.

Finality of prior judgment.

It is also a requisite that the judgment relied upon be a final one. Final judgment in Criminal Action No. 950-47 was entered June 4, 1948 (R. 312, 327). There was no appeal. It may be noted that the absence of a right to an appeal does not affect the application in a subsequent suit of the doctrine of *res judicata*. *Johnson Company* v. *Wharton*, 152 U. S. 252 (1894); *Washington & Georgetown R. Co.* v. *District of Columbia*, 146 U. S. 227 (1893); *Town of Elain* v. *Marshall*, 106 U. S. 578 (1883); *Griffin* v. *Long Island Ru.*, 102 N. Y. 449.[4]

In fact, the appellant may well have had a right of appeal from the trial court's ruling in Criminal Action No. 950-47. The United States Court of Appeals to which such an appeal could have been sought held that an appeal lay from a judgment of acquittal entered upon a motion under Federal Rules of Criminal Procedure 29, in a situation quite similar to that in Criminal Action No. 950-47. (*United States* v. *Waters*, 175 F. 2d 340, C. A. D. C. 1948).

The prior judgment was rendered in favor of these appellants or their privies.

At the close of the Government's case in Criminal Action No. 950-47, the trial judge granted the motions of Appellees National Association of Real Estate Boards and Washington Real Estate Board for a judgment of acquittal (R. 310). Final judgment in favor of these two Appellees was thereupon entered (R. 327). The other appellees were privies of the two acquitted Appellees, and their interests in this civil action are identical with one or the other of the two acquitted Appellees as the complaint herein reveals (R. 364-366).

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[4] This Court has held, in fact, that a reversal upon appeal does not prevent the application of the doctrine. *Reed* v. *Allen*, 286 U. S. 191 (1932); *Deposit Bank* v. *Frankfort*, 191 U. S. 499.

The Mitchell Case exception to the res judicata doctrine is not here applicable.

While a jury had been empaneled in Criminal Action No. 950-47 (R. 5), and heard all the evidence produced at the trial, the case never went to the jury, as the trial judge granted motions for judgment of acquittal made by the acquitted Appellees pursuant to *Federal Rule of Criminal Procedure* 29 (R. 310, 312). *Helvering* v. *Mitchell*, 303 U. S. 391 (1938), therefore, is not in point. As discussed below, it is not controlling by analogy, as the ground upon which the judgment was rendered herein did not involve the question of burden of proof. Although the consideration could not have been controlling in view of the *Mitchell* decision's failure to overrule *Coffey* v. *United States*, *supra*, 116 U. S. 437 (1886), as discussed *supra*, the *Mitchell* decision did point out that in ordinary criminal actions the government often can not produce as much evidence as in a civil suit where a defendant can be made to testify. In the instant case this consideration is not present since both Appellees who were tried were corporations, and their officers and employees, including many of the other Appellees herein, were government witnesses (R. 29-294). A glance at this portion of the transcript of that proceeding will indicate that the government was able to try its case as fully as it could have been re-tried in this action. The government, in fact, stipulated that this action be tried on that transcript (R. 428).

That the consideration of ability to obtain evidence was not a controlling consideration in the *Mitchell* decision is also indicated by the fact that the rule of *res judicata* applies in favor of the Government in a civil action brought after an anti-trust criminal conviction. (*Local 167* v. *United States*, 291 U. S. 293, 1934). The *defendant* in a criminal proceeding is likewise more limited in his ability to obtain evidence and to present his case. Compare *Federal Rules of Civil Procedure* 33 and 36 with *Federal Rule*

of Criminal Procedure 16. The *Mitchell* decision may only be sustained on its major ground, that in a criminal acquittal based on a general *jury* verdict, it is impossible to determine what issues were determined. That situation is not, as is discussed *infra*, present in the instant case.

No analogy to the Mitchell Case is here applicable.

Mr. Justice Stephens in his exhaustive treatment of this phase of the law of *res judicata* in the concurring opinion in *United States* v. *United States Gypsum Co.*, *supra*, 51 F. Supp. 613 at 628-9 (D. C. D. C. 1943) states that certain directed verdicts might be analogized to the jury verdict in the *Mitchell* case situation. *Unless the record showed* the basis of the court's ruling, that opinion suggests the trial judge might have decided that all the evidence even if true could not in the mind of a reasonable man prove the crime *beyond a reasonable doubt*, although it could by a preponderance of the evidence. See *Curley* v. *United States*, 81 U. S. App. D. C. 389, 392-3, 160 F. 2d 229 (1947), *cert. denied* 331 U. S. 837 (1947).

The criminal action here, however, falls within the exception to the suggested analogy to the jury cases. The record in Criminal Action No. 950-47 shows that the trial judge did not grant the motions for judgments of acquittal on any basis of burden of proof. The court's oral opinion delivered from the bench (R. 306-310) indicates that he granted the motions because as charged in the indictment (R. 313-319), sought to be proved (R. 29-294) and argued by all parties upon the motions for judgment (R. 304-305) the government's theory of its case, *as a matter of law*, was unsound. Put another way, the Court held that all the facts charged did not amount to a violation of the Sherman Act. Nowhere in the trial judge's opinion from the bench

Nor has there ever been doubt that State court judgments are *res judicata* in a Federal court because of differences of procedure, rights to appeal or the like.

is there a mention of burden of proof. The following excerpt therefrom typifies the entire holding (R. 307-308):

> "The facts of the matter are that the defendants, who are real estate men, have entered into voluntary association for the purpose of bettering the conduct of their business, and after entering such associations they still continue their individual business in full competition with each other, and that the associations themselves, as associations, do no business whatever, but are simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; to maintain and uphold it in the proper way; and to create methods of preserving integrity amongst the members of the association.
>
> "In my view the charges of a real estate broker on account of his personal services are nothing more than charges for aids or facilities furnished to clients whereby their objects may be the more easily and readily accomplished. It is my view that charges or commissions of real estate brokers in the District of Columbia are based on personal services performed for clients, and their effect in the sale of real estate are not directly connected with or form a part of interstate commerce in the District of Columbia, because I feel that charges for services of this character and nature do not immediately touch upon or act upon nor do they directly affect the sale of real estate in the District of Columbia.
>
> "Of course indirectly and as an incident they may enhance the cost to the owner of real estate, or they may add to the price paid by the purchaser, but they are not, in my opinion, charges which are directly laid upon real estate itself. Rather are they charges for facilities given or provided to clients in the course of the sale of real estate.
>
> "Here in this case the conspiracy condemned by the statute is one whose direct and immediate effect is a restraint upon trade or commerce in the District of Columbia. As I say, charges for such facilities, in my opinion, are not restraints upon the trade or commerce, although, as I have indicated, the total cost of selling the real estate may be increased."

The trial judge relied upon *Hopkins* v. *United States;* 171 U. S. 578 (1898) and *State* v. *Duluth Board of Trade,* 107 Minn. 506 (1909) to hold *as a matter of law,* not upon any issue of degree of proof of facts, that the facts proved showed no conspiracy in restraint of trade under Section 3 of the Sherman Act (15 U. S. C. A. § 3). *Opinion,* Criminal Action No. 950-47 (R. 307-308). That issue of law is *identical* with the one presented by the complaint in this action and the Appellant and these Appellees are bound by the prior final determination of this issue of law. No exception to *res judicata* based on differences in proof can be applicable here as this issue is one of law and was decided without any dependence upon whether facts had been established beyond a reasonable doubt or merely by a preponderance of the evidence.

The District Court should have decided this identical issue the same way upon Appellees' motions for summary judgment, and should have so decided at the conclusion of the entire case. See Conclusion of Law No. 4 (R. 436). Appellees never abandoned the defense, see Findings of Fact No. 21-27 (R. 435).

Upon a question of *res judicata* neither the trial court nor an appellate court should consider whether or not, if the issue were before it for decision for the first time, it would have so decided. Even erroneous decisions are *res judicata;* any other rule would make the doctrine meaningless. *United States* v. *Oppenheimer,* 242 U. S. 85 (1916); *United States* v. *Moser,* 266 U. S. 236 (1924); *Stoll* v. *Gottlieb,* 305 U. S. 165 (1938). As the Supreme Court said in the *Moser* case, 266 U. S. at 242:

> "But a *fact, question,* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."

Appellant urges (Br. p. 69) that the ruling made by the criminal trial judge was not in issue. A comparison

of the indictment (R. 313-319) with the criminal trial court's opinion (R. 306-310) indicates the contrary. The trial judge ruled that what the Washington Board and its members were doing was not a direct restraint on commerce and did not violate the Sherman Act. That issue of law is present in the instant civil case, and if determined the same way again would dispose of the controversy in favor of appellees.

Appellant's argument, apparently, is that no issues of law can be raised by a motion under Federal Rule of Criminal Procedure 29. This would be a peculiar application of the rule. How else, might it be asked, could a legal issue be raised in a criminal trial unless it was clear on the face of the indictment? It has been held in the circuit from which this appeal is prosecuted, that Rule 29 may even raise the question of the sufficiency of the indictment. (*United States* v. *Waters*, 175 F. 2d 340 C. A. D. C., 1948).

There is no doubt that a trial judge's opinion (R. 306-310) may be examined to determine what issue was decided for the purposes of *res judicata*. Such has been the law in the circuit from which this appeal is prosecuted for many years. (*Nalle* v. *Oyster*, 36 App. D. C. 36, 1910, *affirmed with respect to the results of this holding Nalle* v. *Oyster*, 230 U. S. 165, 181, 1913.)

This Court to determine whether it has jurisdiction of a direct appeal under the Criminal Appeals Act (18 USCA § 682), in *United States* v. *Swift & Co.*, 318 U. S. 442 at 444 (1943), examined the opinion of the trial judge in the case below as reported in 46 F. Supp. 848 *in order to determine the issues ruled upon by the trial judge*. In *United States* v. *Wayne Pump Co.*, 317 U. S. 200 at 204-6 (1942), that Court likewise examined the opinion below, as reported in 44 F. Supp. 949, to determine the issues decided by the trial judge. See also *United States* v. *Maryland-Virginia Milk Producers Asso.*,

93 L. Ed. (Adv.) 15 (1948). If this Court can examine such an opinion, to discover the issues decided, the District Court and this Court can do so in the instant case.

Even were the opinion from the bench not part of the record in Criminal Action No. 950-47, the remainder of the record therein shows that no issue of reasonable doubt as to facts was the basis of the granting of the judgment of acquittal. Being aware of the concurring opinion in the *Gypsum* case, and having in mind that that opinion had stated that a directed verdict formed a basis of *res judicata* if in the nature of a ruling on a demurrer to the evidence, the acquitted Appellees made it clear to the trial judge that they were asking for such a ruling. Counsel for Appellee National Association of Real Estate Boards in making the motion, in which counsel for Appellant Washington Real Estate Board joined, stated (R. 304):

> "MR. WHITEFORD: If Your Honor pleases, in behalf of the National Association I make this motion for a judgment of acquittal.
>
> "The National Association of Real Estate Boards move for a judgment of acquittal on the ground that no substantial evidence has been adduced against the said defendant upon which a reasonable mind could infer guilt beyond a reasonable doubt.
>
> "The National Association makes the same motion on the ground there has been no showing of any violation of the Sherman Act.
>
> "In this last aspect, the motion is in the nature of a demurrer to the evidence.
>
> *"I may say at the outset that I file this motion in this form as seemingly required by the Circuit Court in the Gypsum case which is referred to, having in mind that a motion granted on those grounds would amount to res judicata so far as the equity suit is concerned."* (Emphasis added).

As the oral argument upon that motion progressed it became evident that the case was to turn upon a point of law. The government in closing its argument stated as much (R. 304-305):

"[MR. KRAMER] . In conclusion, if Your Honor please, I want to say once more with the exception of the intent and purpose of the Committee on Rates, Rules and Customs, with that exception I don't think that Brother Whiteford and I have any dispute about the facts in this case. *I think Your Honor is presented with a question of law which is pretty neatly tied up with the considerations and that is:* Is an agreement by each member of an association in the District of Columbia with a third party to abide by whatever rates of commissions that association establishes an agreement, a price fixing agreement in restrict of trade? We say it is and we say it is for that very same reason that the Court said it was in the Gypsum case." (Emphasis added).

The granting of the motions alone, after those two statements, shows from the record that the trial court's ruling was in the nature of a ruling upon demurrers to the evidence so that there is no question of reasonable doubt in the record. Here is a case in which it is possible to tell from the record, either with or without the trial judge's opinion, that the issue of burden of proof beyond a reasonable doubt was not the basis of the judgment, so that the one exception to *res judicata* is not applicable.

Appellant, however, at page 66 of its Brief, urges that since both a civil and a criminal remedy are provided by sections 1-4 of the Sherman Act (15 USCA § 1-4) Congress intended the government in a civil action to proceed even if the criminal action was lost. This argument entirely begs the question, since Congress obviously only intended the government to have concurrent remedies *if there had been a violation of the Sherman Act.* See *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20 (1912). But where there is no violation, remedies become immaterial. That the Appellant might have obtained both civil and criminal relief had it been determined that there had been a violation, does not support the proposition that Appellant should be given an opportunity to re-litigate here their entire cause of action.

What appellant really fears is that it might lose in this situation a peculiar and unfair advantage which it usually enjoys when it first prosecutes its criminal action and then, later, turns to the companion civil action. Usually, the criminal action will go to the jury. The Government then stands much to gain and little to lose. If it gains a jury verdict, it pleads it as *res judicata* in the civil action and obtains an automatic judgment without re-trial. (*Local 167* v. *United States, supra,* 291 U. S. 293, 1934.) But, if it should lose, it may have another chance to prove its case relying on *Helvering* v. *Mitchell,* 303 U. S. 391, (1938).

Only the accident that most acquittals are by general jury verdict, so that there is a *possibility* that a different degree of proof was used, prevents application of the rule of mutuality inherent in the doctrine of *res judicata. Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, 127 (1912); *Ingersoll* v. *Coram,* 211 U. S. 335, 364 (1908); *Litchfield* v. *Goodnow,* 123 U. S. 549 (1887); *Davis* v. *First National Bank,* 139 Tex. 36, 161 S. W. 2d 467, 144 ALR 1 (1942). When a court can, from the record in the prior case, eliminate that bare possibility that the prior acquittal was based on reasonable doubt although the facts were established by a preponderance of the evidence, considerations of fair play demand that it do so.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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